87 No. 1318

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1987

VOLT INFORMATION SCIENCES, INC.,
Appellant,

vs.

BOARD OF TRUSTEES OF LELAND STANFORD
JUNIOR UNIVERSITY, Appellee.

ON APPEAL FROM THE
COURT OF APPEAL OF CALIFORNIA
SIXTH APPELLATE DISTRICT

JURISDICTIONAL STATEMENT

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QUESTION PRESENTED

Whether a California statute limiting the enforceability of arbitration agreements, which directly conflicts with the Federal Arbitration Act and would therefore ordinarily be preempted in any case involving a transaction covered by the Act, may nevertheless be applied in such a case to deny enforcement of an arbitration agreement, where the agreement appears in a construction contract that is to be performed in California and the contract contains a choice-of-law clause specifying that it "shall be governed by the law of the place where the project is located."

STATEMENT PURSUANT TO 28 U.S.C. §2403(b)

Since this appeal presents the question whether a California statute conflicts with the Federal Arbitration Act and is therefore invalid under the Supremacy Clause of the United States Constitution, appellant hereby informs the Court that the provisions of 28 U.S.C. §2403(b) may be applicable, and that the Court may therefore invite the Attorney General of California to file a brief in support of the validity of the statute. Pursuant to Rule 28.4(c) of the Rules of this Court, a copy of this Jurisdictional Statement will be served on the Attorney General.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes, Rules
and Constitutional Provisions

Treatises

OPINIONS BELOW

The opinion of the California Court of Appeal is reprinted as Appendix A hereto, and is reported in the advance-sheet edition of the California Appellate Reports at 195 Cal.App.3d 349, and in the West's California Reporter at 240 Cal.Rptr. 558. The order of the California Supreme Court denying appellant's petition for review of the court of appeal's decision is unreported and is reprinted as Appendix B. The order of the state trial court denying appellant's petition to compel arbitration, also unreported, is reprinted as Appendix C.

JURISDICTION

The principal issue presented by this case, at all levels of the proceedings below, has been whether section 1281.2(c) of the California Code of Civil Procedure is preempted and hence rendered invalid, as applied to this case, by provisions of the Federal Arbitration Act with which this state statute is in direct conflict (see App. A, pp. 6-12). The state trial court and court of appeal have rejected appellant's contention that section 1281.2(c)

is preempted by the federal Act, and have accordingly sustained its application to this case as a basis for denying appellant's petition to compel arbitration (id.). Under the decisions of this Court, such a ruling of a state court, rejecting a claim that the application of a state statute in a particular case is preempted by federal law, constitutes a "decision in favor of [the] validity" of the statute as against a contention that it is "repugnant to the Constitution, laws or treaties of the United States" within the meaning of 28 U.S.C. §1257(2). International Longshoremen's Union v. Davis, ___ U.S. ___, 106 S.Ct. 1904, 1910n.8 (1986); McCarty v. McCarty, 453 U.S. 210, 219-20n.12 (1981). See Perry v. Thomas, ___ U.S. ___, 107 S.Ct. 2520 (1987) (appeal accepted without discussion); Southland Corp. v. Keating, 465 U.S. 1 (1984) (semble); Fidelity Fed. S. & L. Assn. v. de la Cuesta, 458 U.S. 141 (1982) (semble); 16 Wright et al., Federal Practice & Procedure §4012 at p. 603 (1977) (Court's appeal jurisdiction under 28 U.S.C. §1257(2) is "regularly

exercised in cases involving conflict with federal statutes"). This statutory prerequisite to the assertion of this Court's appellate jurisdiction is therefore clearly satisfied in this case.

This case also fulfills the other condition prescribed by the governing statute for the Court's acceptance of jurisdiction over this appeal - namely, that the appeal be taken from a "[f]inal judgment or decree of the highest court of a State in which a decision could be had." 28 U.S.C. §1257(2). Appellant's claim of preemption has been rejected on the merits by a final judgment of an intermediate appellate court of California, and the California Supreme Court has exercised its discretion to decline to review the case (Apps. A, B). In these circumstances, the intermediate appellate court is effectively constituted "the highest court of [the] State in which a decision could be had," and its judgment accordingly becomes reviewable by appeal to this court. Interstate Circuit, Inc. v. Dallas, 390 U.S. 676, 678n.1 (1968);

Michigan-Wisconsin Pipeline Co. v. Calvert, 347 U.S. 157, 160 (1954); American Ry. Exp. Co. v. Levee, 263 U.S. 19, 20 (1923). See Perry v. Thomas, supra (appeal accepted without discussion of this point); Fidelity Fed. S. & L. Assn. v. de la Cuesta, supra (semble); McCarty v. McCarty, supra (semble).

Finally, there is no question that this Court's jurisdiction has been timely and properly invoked by appellant. The judgment of the court of appeal was rendered on October 5, 1987, and appellant timely sought review of the judgment by filing a petition for review in the state Supreme Court on November 12, 1987 (Apps. A, G). See Calif. Rules of Court, Rules 24(a); 28(b). The order of the state Supreme Court denying appellant's petition for review was entered on December 17, 1987 (App. B), and the notice of appeal was filed in the intermediate appellate court on January 14, 1988, which is well within the time permitted by the governing statute for the taking of an appeal to this Court. 28 U.S.C. §2101(c) (90 days); American Ry. Exp. Co. v. Levee, supra at 20 (time runs

from denial of discretionary review by state supreme court). A copy of the notice of appeal is being filed herewith as Appendix D.

STATUTES INVOLVED

The constitutional and statutory provisions involved in this case are the Supremacy Clause of the United States Constitution (U.S. Const., art. VI, cl. 2), sections 1-4 of the Federal Arbitration Act (9 U.S.C. §§1-4), and section 1281.2(c) of the California Code of Civil Procedure. These provisions are set forth in Appendix H.

HOW THE FEDERAL QUESTION WAS PRESENTED

Appellant's claim that section 1281.2(c) of the California Code of Civil Procedure is preempted by the conflicting prescriptions of the Federal Arbitration Act was repeatedly raised by appellant at every stage of the proceedings below. The following are but a few examples of appellant's numerous assertions of this contention at each level of the state court proceedings: (1) appellant argued in the state trial court that this state statute was constitutionally inapplicable to this case

because, "[t]o the extent any California law could be interpreted as preventing enforcement of or interfering with the arbitration agreement, it violates the Supremacy Clause and is null and void" (App. E, p. 6); (2) appellant argued in the state court of appeal that "the Supremacy Clause of the United States Constitution ... dictates that the Federal Arbitration Act preempts any state law, including C.C.P. §1281.2(c), that purports to impose restrictions on the enforcement of arbitration agreements of a kind not authorized by the federal Act" (App. F, p. 13); and (3) appellant argued in the state Supreme Court that, under a proper interpretation of the choice-of-law clause in the parties' contract, the provisions of the Federal Arbitration Act requiring arbitration of their dispute would apply to this case, and "would clearly preempt the conflicting prescriptions of C.C.P. §1281.2(c)" (App. G, pp. 7, 23-25). The state court of appeal expressly acknowledged appellant's arguments to this effect by addressing the preemption issue at considerable

length in its opinion rejecting appellant's claim (App. A, pp. 6-12). Copies of pertinent excerpts from the several briefs in the state trial court, court of appeal, and Supreme Court illustrating appellant's repeated statements of its contention on this issue have been filed herewith as Appendices E through G.

STATEMENT OF THE CASE

Appellant Volt Information Sciences, Inc. ("Volt"), and appellee Leland Stanford Junior University ("Stanford") are parties to a construction contract pursuant to which Volt has constructed a system of electrical conduits connecting various computer facilities on the Stanford campus (JA 17*). Only two of the provisions of this voluminous contract are directly relevant to this appeal. The first of these, the choice-of-law clause, appears in a section of the contract entitled "General

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* The portions of the record in this case which are not included in the Appendix to this Jurisdictional Statement are contained in the Joint Appendix that was filed by the parties in the state court of appeal. See Calif. Rules of Court, Rule 5.1. The Joint Appendix is cited herein as "JA."

Conditions," which consists of a standard-form agreement widely used in the construction industry and generally known as "AIA Document A201" (JA 39). This clause provides simply that "[t]he Contract shall be governed by the law of the place where the project is located" (JA 49).

The other pertinent clause of the agreement, the arbitration clause, appears in a separate section of the contract entitled "Supplementary General Conditions," which consists of a series of special provisions prepared by Stanford that modify the standard-form General Conditions in various respects (JA 58). This particular clause provides that the arbitration clause appearing in the standard-form agreement shall be deleted, and that the following provision shall be inserted in its stead (JA 61):

> "All claims, disputes and other matters in question between the parties to this contract, arising out of or relating to this contract or the breach thereof, shall be decided by arbitration in accordance with the Construction Industry Arbitration Rules of the American Arbitration Association then prevailing unless the parties mutually agreed [sic] otherwise. In any other arbitration, commenced or demanded pursuant to this

> Contract, then either party hereto, upon the written request of the other party, shall join in such arbitrations and agree to the consolidation of the arbitrations. This agreement to arbitrate and to join and consolidate arbitrations shall be specifically enforceable under the prevailing arbitration law. The award rendered by the arbitrators shall be final, and judgment may be entered upon it in any court having jurisdiction thereof."

The principal difference between this provision and the arbitration clause in the standard-form agreement which it displaces concerns the conditions under which an arbitration between the parties may be consolidated with another arbitration of a dispute between one of the parties and a third person arising out of the same project. The standard-form clause would have expressly prohibited consolidation of such third-party disputes without the written consent of all concerned parties (JA 50). By contrast, the substituted special provision quoted above not only pointedly omits any such prohibition, but additionally includes an express mandate for the consolidation of any separate arbitrations that might arise from the parties' transaction (JA 61).

Stanford thus clearly contemplated the

possibility of potentially duplicative proceedings resulting from disputes with other participants in the project, and deliberately chose to deal with this problem, not by inserting a proviso excusing the parties from their duty to arbitrate in that event, but rather by simply authorizing the consolidation of any separate arbitrations that might result from such disputes. Having chosen this course, however, Stanford then inexplicably neglected to include arbitration clauses in the agreements which it entered into with these other participants (JA 126, 135, 144). The contracts with the project architect and the construction manager, in particular, omitted any provision for arbitration of disputes arising under those contracts (id.).

During the course of the project, various disagreements arose between Volt and Stanford which the parties were unable to settle by negotiation (JA 182-83). Accordingly, at the conclusion of the project, Volt submitted to Stanford a demand for arbitration of these disputes pursuant to the arbitration clause of

the parties' contract (JA 185). Stanford, however, refused to proceed with the arbitration, and instead filed suit against Volt in the state superior court for Santa Clara County (JA 1, 184). In its complaint, Stanford asserted several causes of action against Volt involving all of the same matters that were the subject of Volt's demand for arbitration (JA 5-12, 185-88). In addition, the complaint stated a single cause of action for declaratory relief against the architect and construction manager, in which Stanford sought a declaration that, in the event it should be held liable to pay any damages to Volt, these firms should be required to indemnify it for any amount thus paid (JA 12-13).

Volt thereupon petitioned the superior court, pursuant to both the Federal Arbitration Act, 9 U.S.C. §§1 et seq., and the California Arbitration Act, Calif.Code Civ.Proc. §§1280 et seq., to compel arbitration and to stay the prosecution of Stanford's claims against it pending the outcome of the arbitration (JA 153). Stanford, in turn, moved to stay the

arbitration, contending that arbitration of its dispute with Volt could not be compelled during the pendency of litigation involving additional claims against the architect and construction manager arising out of the same transaction which could not be arbitrated because of the omission of any arbitration clause from its agreements with those parties (JA 209). In support of its motion, Stanford relied on the provisions of section 1281.2(c) of the California Code of Civil Procedure, which permits a superior court to deny a petition to compel arbitration or to stay a pending arbitration when "[a] party to the arbitration agreement is also a party to a pending court action or special proceeding with a third party, arising out of the same transaction or series of related transactions, and there is a possibility of conflicting rulings on a common issue of law or fact."

In its opposition to Stanford's motion, Volt contended that section 1281.2(c) was inapplicable in the circumstances presented here, and that in any event, since this project

involved interstate commerce, this state statute was effectively preempted by the conflicting requirements of the Federal Arbitration Act, which do not permit avoidance of an arbitration agreement on the grounds specified by this statute (JA 235; App. E). In its response to this latter contention, Stanford did not dispute that the application of federal law would indeed require enforcement of its agreement to arbitrate, but instead contended that the federal Act was rendered inapplicable in this context by the provision of the parties' agreement specifying that its enforcement should be governed by "the law of the place where the project is located" (JA 225-27).

Apparently in reliance on this choice-of-law clause, the superior court rejected Volt's argument that Code Civ.Proc. §1281.2(c) was preempted by federal law and held that this statute effectively excused Stanford from its obligation to arbitrate (App. C). The court accordingly entered an order denying Volt's petition to compel arbitration and granting

Stanford's motion to stay the arbitration until the conclusion of the lawsuit (id.).

Volt filed a timely appeal to the California Court of Appeal for the Sixth Appellate District, reiterating its contention that Calif.Code Civ.Proc. §1281.2(c) was preempted by the contrary prescriptions of the Federal Arbitration Act (JA 255; App. F). On the specific issue of the effect of the choice-of-law clause, Volt argued (1) that the clause did not in fact preclude the application of federal law because the phrase "law of the place where the project is located" necessarily encompassed all of the law - local, state, and federal - that was in fact applicable at the project site; (2) that the same result would follow even if this phrase were construed as an exclusive reference to California law, because the nature of the federal system is such that federal law constitutes an integral part of the law of California, as of every other state; and (3) that in any event, a substantial body of authority had held that any such contractual choice-of-law provision that purported to

foreclose the application of the Federal Arbitration Act to a transaction that would otherwise be subject to its terms should simply be invalidated as an illicit attempt to subvert the objectives of the Act (App. F, pp. 11-20).

The court of appeal rejected all of these arguments and affirmed the superior court's order in an opinion in which two members of the court joined (App. A). The court held that application of the federal Act was foreclosed by the choice-of-law clause and accordingly rejected Volt's preemption claim and sustained the superior court's reliance on Code Civ.Proc. §1281.2(c) as a proper basis for denying Volt's petition to compel arbitration (id.). The third member of the court dissented from this ruling, stating his view that the choice-of-law clause did not preclude the application of federal law to this case, because, in his words, "even assuming arguendo that it must be interpreted as an agreement to have California law govern, ... where federal law is supreme, California law mandates that federal law controls" (id., pp. 19-23).

Volt filed a timely petition for review in the California Supreme Court, again reiterating all of the arguments it had made in the courts below and, in addition, calling the court's attention to the several conflicting resolutions of the question presented by this case that had been reached by various appellate courts in California and elsewhere (App. G). On December 17, 1987, the Supreme Court issued its order denying Volt's petition for review (App. B). By the same order, the court directed that the court of appeal's opinion should not be published in the permanent edition of the official California Appellate Reports (id.). Volt filed its notice of appeal to this Court on January 14, 1988 (App. D).

THE ISSUE PRESENTED BY THIS CASE DESERVES PLENARY CONSIDERATION BY THIS COURT

I. Introductory Summary

This case presents probably the most important unresolved issue affecting the relationship between the Federal Arbitration Act and the laws of the several states governing arbitrability of private disputes. That issue is whether a state statute limiting

arbitrability of such disputes, which directly conflicts with the federal Act and would therefore ordinarily be preempted in any case covered by the Act, may nevertheless be applied in such a case to deny enforcement of an arbitration agreement where the contract contains a choice-of-law clause specifying that it shall be governed by the law of the place where the contract is to be performed.

To date, this question has arisen in no less than sixteen reported decisions of the state appellate courts and lower federal courts, and these decisions have offered an unfortunate profusion of disparate answers to the question. Although most courts have held that such a choice-of-law provision is ineffective to preclude application of the federal Act and consequent preemption of conflicting state laws, even the decisions representing this majority view have espoused widely differing rationales to support this result, ranging from straightforward interpretations of the contractual language to sweeping pronouncements of the outright

invalidity of any contractual provision that might restrict the application of federal law. Meanwhile, a small minority of decisions, exemplified by the decision of the court of appeal in this case, have adopted a contrary view that such a choice-of-law clause entirely precludes the application of the Federal Arbitration Act and accordingly permits reliance on state statutes that would otherwise clearly be preempted by its terms. These aberrant holdings have persisted notwithstanding a decision of this Court that would seem to have rejected this minority position some years ago by clearly declaring, albeit in a case not involving the subject of arbitration, that a contractual choice-of-law provision referring to "the law of the jurisdiction" where the contract is to be performed necessarily "includes federal as well as state law" and therefore does not prevent federal preemption of otherwise conflicting state laws. Fidelity Fed. S.& L. Assn. v. de la Cuesta, supra, 458 U.S. at 157n.12.

This wide divergence of views among the

lower courts, which will be described in more detail in the discussion that follows, is the most obvious reason why the issue presented by this case merits plenary consideration by this Court. The other, equally compelling reason, which is also discussed more fully below, is the inherent importance of this issue, which directly affects the enforceability of arbitration agreements in a great number of transactions, including precisely those types of transactions in which such agreements are most commonly utilized.

II. There Is No Serious Dispute That, Unless the Choice-of-Law Clause in the Parties' Contract Were Found to Dictate a Different Result, the Federal Arbitration Act Would Preempt the State Statute Relied upon by the Court Below and Would Require Reversal of Its Decision Relieving Stanford of Its Duty to Arbitrate Its Dispute with Volt.

Before turning directly to a discussion of the importance of the issue presented here and the conflict over that issue that has arisen among the decisions of the lower courts, it is necessary to demonstrate initially that this issue is indeed dispositive of the outcome of this suit and hence squarely presented for decision on the facts of this case. This

demonstration will involve nothing more than the brief statement of certain familiar propositions regarding the general applicability of the Federal Arbitration Act. Taken together, these propositions establish that, unless the choice-of-law clause in the parties' contract were found to dictate a different result, the federal Act would govern the disposition of this case and would require that Stanford be compelled to arbitrate its dispute with Volt, notwithstanding the conflicting dictates of the state statute that was relied upon by the courts below to relieve Stanford of its obligation in this regard.

First of all, it is by now well settled that the Federal Arbitration Act creates a comprehensive body of substantive law governing all arbitrations arising out of transactions affecting interstate commerce, and that its provisions are therefore required to be enforced in state courts, as well as federal courts, to the exclusion of any conflicting provisions of state law. Perry v. Thomas, ___ U.S. ___, 107 S.Ct. 2520, 2525 (1987); South-

land Corp. v. Keating, 465 U.S. 1, 12 (1984); Moses H. Cone Mem. Hosp. v. Mercury Constr. Co., 460 U.S. 1, 24, 26 (1983); Chan v. Drexel, Burnham, Lambert, Inc., 223 Cal.Rptr. 838, 841 (Cal.App. 1986); Main v. Merrill, Lynch, Pierce, Fenner & Smith, Inc., 136 Cal.Rptr. 378, 381 (Cal.App. 1977); Merrill, Lynch, Pierce, Fenner & Smith, Inc. v. McCollum, 666 S.W.2d 604, 609-10 (Tex.Civ.App. 1984), cert. den. 469 U.S. 1127 (1985). As this Court stated in the often quoted passage from its opinion in Moses H. Cone Mem. Hosp. v. Mercury Constr. Co., supra, the Act "create[s] a body of federal substantive law of arbitrability applicable to any arbitration agreement within the coverage of the Act," which "governs that issue in either state or federal court ... notwithstanding any state substantive or procedural policies to the contrary." Id., 460 U.S. at 24.

Secondly, it is equally clear that if the federal Act were to be applied to this case, its application would necessarily mandate judicial enforcement of Stanford's agreement to

arbitrate its dispute with Volt, and would thus require reversal of the decisions of the courts below denying Volt's petition for that relief. As noted earlier, and as the court of appeal's opinion makes clear, the sole basis for those decisions was the provision of section 1281.2(c) of the California Code of Civil Procedure that authorizes denial of a petition to compel arbitration where related non-arbitrable claims have been asserted against third parties in a pending lawsuit. The Federal Arbitration Act contains no counterpart provision permitting avoidance of an arbitration agreement in these circumstances, and the decisions of the state and federal courts applying the Act have therefore unanimously held that the existence of such non-arbitrable third-party claims does not afford a proper ground for denying or staying the enforcement of such an agreement. Moses H. Cone Mem. Hosp. v. Mercury Constr. Co., supra, 460 U.S. at 19-20; C.Itoh & Co. v. Jordan Intl. Co., 552 F.2d 1228, 1231 (7th Cir. 1977); Acevedo Maldonado v. PPG Industries, Inc., 514 F.2d 614, 617 (1st

Cir. 1975); Hamilton Life Ins. Co. v. Republic Natl. Life Ins. Co., 408 F.2d 606, 609 (2d Cir. 1969); Hilti, Inc. v. Oldach, 392 F.2d 368, 369n.2 (1st Cir. 1968); Liddington v. The Energy Group, Inc., 238 Cal.Rptr. 202, 207 (Cal.App. 1987); R.J. Palmer Constr. Co. v. Wichita Band Instr. Co., 642 P.2d 127, 131 (Kan.App. 1982); Episcopal Housing Corp. v. Federal Ins. Co., 239 S.E.2d 647, 652 (S.C. 1977). Cf. Dean Witter Reynolds, Inc. v. Byrd, 470 U.S. 213, 218-21 (1985) (arbitration compelled despite "intertwining" of arbitrable and non-arbitrable claims). If applied in this case, this settled federal rule would clearly preempt the directly conflicting prescriptions of section 1281.2(c) and hence eliminate the only legal basis for the denial of Volt's petition. As the court of appeal itself acknowledged, it is thus "apparent that were the federal rules to apply, Volt's petition to compel arbitration would have to be granted" (App. A, pp. 3-4).

Finally, there is no question that, unless otherwise dictated by the choice-of-law clause,

federal law would indeed govern the disposition of this case, because the arbitration agreement at issue here clearly "evidenc[es] a transaction involving ... commerce among the several states" within the meaning of the provisions of the federal Act defining the scope of its coverage. 9 U.S.C. §§1-2. Volt established by uncontradicted evidence in the trial court that a large proportion of its manpower and equipment was transferred or shipped to California from other states for use on the Stanford project, and that the project was administered from Volt's offices outside California (JA 207-8). Under the standards enunciated in the case law on this issue, these facts clearly establish a sufficient nexus with interstate commerce to bring this transaction well within the purview of the federal Act. Prima Paint Co. v. Flood & Conklin, 388 U.S. 395, 401 (1967); Del E. Webb Const. Co. v. Richardson Hosp. Auth., 823 F.2d 145, 147-48 (5th Cir. 1987); In re Mercury Constr. Corp., 656 F.2d 933, 942 (4th Cir. 1981), affd. sub nom. Moses H. Cone Mem. Hosp. v. Mercury

Constr. Corp., supra, 460 U.S. 1 (1983); Pathman Const. Co. v. Knox Cty. Hosp. Assn., 326 N.E.2d 844, 848-51 (Ind.App. 1975); Episcopal Housing Corp. v. Federal Ins. Co., supra, 239 S.E.2d at 650-52; Allison v. Medicab Intl., 597 P.2d 380, 382 (Wash. 1979).

All of these settled propositions were apparently accepted by the courts below, and in fact have never been seriously contested by Stanford itself.* It follows that the only

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* This description of Stanford's position must be qualified in one minor respect. In its brief in the court of appeal, Stanford attempted, somewhat obliquely, to cast some doubt on the general applicability of the remedial provisions of the federal Act in state courts by pointing to an admittedly somewhat puzzling footnote in the opinion of this Court in Southland Corp. v. Keating, supra, where the Court, in the course of responding to one of the points made by the dissenting justice, had suggested that the sections of the Act specifying the methods for enforcing arbitration agreements might not be specifically applicable in state trial courts (Stanford's Brief, pp. 12-13, citing Southland, supra, 465 U.S. at 16n.10). In its reply brief, Volt responded to this argument by demonstrating at considerable length that the actual holdings of this Court, including the holding in Southland itself, as well as the decisions of many state and lower federal courts on the issue, had clearly established that the remedies and procedures prescribed by the federal Act, whether by virtue of these particular sections or otherwise, were enforceable in (contd.)

remaining issue standing in the way of a determination that the state statute relied upon by the courts below was indeed preempted by the Federal Arbitration Act, and that Volt's petition to compel arbitration pursuant to the Act should therefore have been granted, is the question whether the application of the federal Act to this case is foreclosed by the clause in the parties' agreement specifying that its enforcement "shall be governed by the law of the place where the project is located." Having thus established that this issue is indeed squarely presented by this case, Volt

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(footnote contd.) state courts as well as in federal courts (Volt's Reply Brief, pp. 15-34). This entire debate was ultimately mooted by another decision of this Court handed down after the filing of the briefs but before the oral argument in the court of appeal. In that decision, Perry v. Thomas, supra, the Court squarely held, by specifically enforcing a petition to compel arbitration brought in a California superior court under the very sections of the Act referred to in the Southland footnote, that these procedural provisions of the federal Act were indeed fully applicable in state courts. Id., 107 S.Ct. at 2523 and n.1. As the court of appeal apparently assumed in its opinion in this case, this intervening decision of this Court has effectively eliminated any serious possibility of further controversy over this point.

will now turn to a demonstration that the issue clearly warrants plenary review by this Court, because of both its inherent importance and the conflict it has engendered among the state and lower federal courts.

III. The State Courts and Lower Federal Courts Have Reached Widely Divergent Conclusions Concerning the Effect of a Choice-of-Law Clause on Federal Preemption of State Laws Limiting the Enforceability of Arbitration Agreements.

A. The Majority View

As noted above, the overwhelming majority of the numerous decisions of the lower courts that have addressed the issue presented by this case have resolved that issue in a manner precisely contrary to the decision of the court below. Those decisions have held that the application of the Federal Arbitration Act and the consequent preemption of conflicting state laws limiting the enforceability of arbitration agreements is not precluded by the presence in the parties' contract of a choice-of-law clause specifying that the contract shall be applied in accordance with the law of a particular state or "the law of the place" where the contract is to be performed. Unfortunately,

however, these decisions have relied upon several different and even sometimes contradictory approaches to the issue, and have therefore failed to develop any consistent rationale to justify this result.

Thus, some of the courts adopting this view, in cases involving contractual language identical or similar to the language of the contract at issue in this case, have simply interpreted that language as literally encompassing federal as well as state law. Typical of these decisions is the holding of the South Carolina Supreme Court in Episcopal Housing Corp. v. Federal Ins. Co., supra, which involved the same form contract that is at issue here. The court in that case disposed of the choice-of-law issue as follows (id., 239 S.E.2d at 650n.1):

> "The court is aware of Section 7.1.1 of the American Institute of Architects Document A201 which provides that, 'The contract shall be governed by the law of the place where the project is located.' This provision, however, would certainly include all applicable law, including the Federal Arbitration Act."

Accord Huber, Hunt & Nichols, Inc. v. Architectural Stone Co., 625 F.2d 22, 25n.8 (5th

Cir. 1980). See also Paul Allison, Inc. v. Minikin Storage, Inc., 486 F.Supp. 1, 2-4 and n.1 (D.Neb. 1979).

A second group of decisions, which have involved choice-of-law provisions referring expressly to the laws of a particular named state, have reached the same result on the somewhat different ground that any such reference to the laws of a state of the United States must be deemed to encompass federal as well as state law because it is a basic tenet of our federal system that the laws of every state incorporate and include the laws of the United States. These decisions are illustrated by the opinion of the Texas Court of Civil Appeals in Mamlin v. Susan Thomas, Inc., 490 S.W.2d 634 (Tex.Civ.App. 1973), where the parties' agreement provided that it should be construed "in accordance with the laws of the State of New York," and the court held that this language necessarily encompassed the Federal Arbitration Act, because, in its words, "[t]he Federal Arbitration Act is the law of New York and also the law of Texas with respect

to any 'contract evidencing a transaction involving commerce.'" Id., 490 S.W.2d at 637. See also Commonwealth Edison Co. v. Gulf Oil Corp., 541 F.2d 1263, 1270 (7th Cir. 1976) (quoting Mamlin, supra). This is of course the same view that was taken by the dissenting justice in the court of appeal in this case (App. A, pp. 19-23).

Thirdly, several courts have managed to reach the same ultimate result despite their adoption of a quite opposite interpretation of the language of the choice-of-law provision. These courts, while implicitly conceding that a choice-of-law clause designating the law of a particular state or "the law of the place" of performance would literally preclude the application of the Federal Arbitration Act, have nevertheless refused to give effect to such a provision on the ground that to do so would subvert the purposes of the Act. The leading decision to this effect is the ruling of the Seventh Circuit in Commonwealth Edison Co. v. Gulf Oil Corp., supra, which involved a choice-of-law clause specifying "the law of the

State of Illinois" as the law governing the application of the agreement. The court held that even if this provision should be interpreted as manifesting an intent to adopt Illinois law to the exclusion of the Federal Arbitration Act, the federal Act would still be deemed to govern the issue of enforceability of the arbitration agreement because the parties had no power to preclude the application of the Act by a choice-of-law clause in their agreement. The court justified this holding as follows (id., 541 F.2d at 1269):

> "Parties are not free to burden the arbitration process under the Federal Act by adopting state law which shifts the determination of disputes from arbitrators to the courts. To allow parties to so contract would undermine the provisions of the Federal Act. Congress, in enacting the Federal Arbitration Act, exercised its power over admiralty and interstate commerce. Any arbitration agreement involving one of those areas is governed by the Federal Act. To permit the parties to contract away the application of the Act by adopting state law to govern their agreement would be inconsistent with the Act itself ...."

Accord Mesa Operating Ltd. P'ship. v. Louisiana Intrastate Gas Comm., 797 F.2d 238, 243-44 (5th Cir. 1986); Paul Allison, Inc. v. Minikin Storage, Inc., supra, 486 F.Supp. at 3. See

also Huber, Hunt & Nichols, Inc. v. Architectural Stone Co., supra, 625 F.2d at 25n.8; Cone Mills Corp. v. August F. Nielsen Co., 455 N.Y.S.2d 625, 627 (N.Y.Sup.Ct. 1982). Cf. Becker Autoradio USA, Inc. v. Becker Autoradiowerk GmbH, 585 F.2d 39, 43 and n.8 (3d Cir. 1978).

The final category of decisions reaching this result have done so without espousing any particular rationale for their rulings. They have simply proceeded to apply the provisions of the Federal Arbitration Act in the face of a choice-of-law clause designating state law as the governing law without affording any significant discussion to the issue raised by the presence of this provision in the contract. LaFarge Conseils et Etudes, S.A. v. Kaiser Cement & Gypsum Co., 791 F.2d 1334, 1338-39 (9th Cir. 1986); Collins Radio Co. v. Ex-Cell-O Corp., 467 F.2d 995, 997-98 (8th Cir. 1972); Hilti, Inc. v. Oldach, supra, 392 F.2d at 370; TAC Travel Amer. Corp. v. World Airways, Inc., 443 F.Supp. 825, 827 (S.D.N.Y. 1978); Liddington v. The Energy Group, Inc., supra,

238 Cal.Rptr. at 204, 207; Ford v. Shearson, Lehman Amer. Express Co., 225 Cal.Rptr. at 896, 897 (Cal.App. 1986); Pinkis v. Network Cinema Corp., 512 P.2d 751 (Wash. 1973). See also Del E. Webb Const. Co. v. Richardson Hosp. Auth., supra, 823 F.2d at 147 (choice-of-law clause not mentioned, but contract was AIA Document A201, which contains the clause at issue here); ADC Const. Co. v. McDaniel Grading, Inc., 338 S.E.2d 733, 735 (Ga.App. 1985) (semble).

B. The Minority View Represented by the Decision of the Court Below

Arrayed against this sizable majority of decisions upholding the application of the Federal Arbitration Act despite the presence of a choice-of-law clause in the parties' contract are two contrary decisions which have held, like the court of appeal in this case, that the inclusion of such a provision in the contract effectively forecloses reliance on the federal Act and requires resolution of the issue of arbitrability in exclusive accordance with state law. Garden Grove Comm. Church v. Pittsburgh Des Moines Steel Co., 191 Cal.Rptr. 15, 20 (Cal.App. 1983); Standard Co. of New

Orleans v. Elliott Const. Co., 363 So.2d 671, 677 (La. 1978).* One of these cases (Standard Co., supra) involved contractual language identical to the language at issue here, and the other (Garden Grove, supra) involved a very similar provision which the court described as adopting "the law of the construction site" to govern the application of the parties' contract. Garden Grove, supra at 20; Standard Co., supra at 677. In both cases, the courts interpreted the choice-of-law clauses as an exclusive reference to state law and on that basis held that the Federal Arbitration Act had no application to the issue of arbitrability of

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* In addition to these two cases, the opinion of the court of appeal cites two additional decisions as support for its holding to this effect in this case (App. A, pp. 5-6, citing Eric A. Carlstrom Const. Co. v. Independent School Dist. No. 77, 256 N.W.2d 479 (Minn. 1977), and Lane-Tahoe, Inc. v. Kindred Const. Co., 536 P.2d 491 (Nev. 1975)). With due respect to the court of appeal, the fact is that neither of these latter decisions has any bearing whatever on this issue. In both cases, the choice-of-law clause was referred to only as a basis for selecting between the laws of different states. The possible application of federal law to the issue of arbitrability was not even raised or considered by the court in either case.

the parties' dispute. Id.

In neither of these cases does the court offer any rationale for this interpretation of the contractual language other than its own ipse dixit. Id. Nor does the court's opinion in either case exhibit any awareness of the substantial body of authority espousing a contrary view on this issue. At all events, however, the significance of these decisions for present purposes is simply that they serve to demonstrate that the decision of the court below in this case is not merely an idiosyncratic anomaly, but instead represents only the latest manifestation of a significant minority position on this issue that has persisted for some time among the decisions of the lower courts.

C. This Court's Treatment of the Issue in the de la Cuesta Case

This divergence of opinion among the lower courts on the issue presented here has endured despite an authoritative pronouncement by this Court in an opinion handed down several years ago that should have been viewed as settling the issue in favor of one of the several

rationales adopted by the courts espousing the majority view on the question. This Court's observations on this issue were delivered in the course of its opinion in Fidelity Federal S. & L. Assn. v. de la Cuesta, supra, which sustained a federal preemption challenge to a rule of state law invalidating "due-on-sale" clauses in certain real-property mortgages issued by federally chartered lending institutions. One of the arguments that had been offered in defense of the state rule and accepted by the court below in that case was a contention that federal law was itself rendered inapplicable to these mortgages by a choice-of-law clause in the mortgages which specified that their application should be "governed by the law of the jurisdiction in which the property is located." Id., 458 U.S. at 148, 150-51. The Court disposed of this argument in a footnote to a passage of its opinion in which it had reaffirmed the general principle that federal law is an inherent part of the law of each state. Id. at 157. In that footnote, the Court stated (Id. at 157n.12):

> "This principle likewise leads us to reject appellees' contention that, with respect to the two deeds of trust containing ¶15, see n.5, supra [the choice-of-law provision], appellants did in fact agree to be bound by local law. Paragraph 15 provides that the deed is to be governed by the 'law of the jurisdiction' in which the property is located; but the 'law of the jurisdiction' includes federal as well as state law."

This statement by this Court would seem to constitute an authoritative endorsement of the view, espoused by the dissenting judge in the court below and by some of the courts representing the majority view on the issue presented here, that a choice-of-law clause referring to "the law of" a particular state or "the law of the place" where the contract is to be performed necessarily incorporates applicable federal law by reason of the basic constitutional principle of federal supremacy. App. A, pp. 19-23; Mamlin v. Susan Thomas, Inc., supra, 490 S.W.2d at 637. See also Commonwealth Edison Co. v. Gulf Oil Corp., supra, 541 F.2d at 1270. Unfortunately, however, it is clear from the subsequent course of the decisions on this issue that the Court's statement to this effect has not in fact been accepted by the various lower courts as

settling tne issue in this manner for purposes of determining the preemptive effect of the Federal Arbitration Act.

Thus, two of the decisions, including the decision of the court below, which have reached a conclusion on this issue diametrically opposed to the view adopted in this Court's de la Cuesta opinion were handed down well after the publication of that opinion; and the other decisions on the issue rendered after that date, while consistent with de la Cuesta in their results, have failed to mention the opinion in support of their rulings and have sometimes espoused very different and even incompatible rationales to justify those results. Mesa Operating Ltd. P'ship. v. Louisiana Intrastate Gas Comm., supra; Liddington v. The Energy Group, Inc., supra; Ford v. Shearson, Lehman Amer. Express Co., supra; Garden Grove Comm. Church v. Pittsburgh Des Moines Steel Co., supra; Cone Mills Corp. v. August F. Nielsen Co., supra. Indeed, one of the decisions directly contravening the de la Cuesta ruling with respect to a very similar

choice-of-law clause was rendered only a year after the de la Cuesta decision by the same court - the California Court of Appeal for the Fourth District - whose decision had been reversed on this very point in de la Cuesta itself. Garden Grove Comm. Church v. Pittsburgh Des Moines Steel Co., supra. See de la Cuesta v. Fidelity Fed. S. & L. Assn., 175 Cal.Rptr. 467, 475 (Cal.App. 1981), revd. 458 U.S. 141 (1982).

The implication is clear that, for whatever reason,* the pronouncements of this Court in

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* The most likely explanation for this puzzling phenomenon is not judicial opacity or obstinacy, but rather understandable oversight. As counsel themselves can attest, the Court's footnote disposition of this issue in the de la Cuesta opinion easily evades detection by normal research methods, not being mentioned in any of the standard sources that one might ordinarily consult in the course of research concerning the effect of a choice-of-law clause on federal preemption of state arbitration laws. For this reason, the de la Cuesta holding was overlooked by counsel for both parties, as well as by the courts themselves, in the course of the proceedings in the lower courts in this case, even though both Volt's briefs and the opinion of the dissenting justice in the court of appeal enunciated precisely the same reasoning that had been adopted by this Court in disposing of this issue in de la Cuesta (App. A, pp. 19-23; App. F, pp. 14-18).

its opinion in the de la Cuesta case have not sufficed, and are not likely to suffice in the future, to resolve the conflict that currently exists among the lower courts on the issue presented by this case. If that conflict is ever to be resolved, and if the considerable confusion on this issue is ever to be alleviated, further elucidation of the issue by this Court will therefore plainly be necessary.* The fact that this case affords an appropriate opportunity for such further

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* No other opinion of this Court, besides de la Cuesta, has addressed the specific issue presented by this case. Although the Court has encountered choice-of-law clauses in arbitration agreements in two other cases, neither of those decisions has any real bearing on this issue. Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614 (1985); Scherk v. Alberto-Culver Co., 417 U.S. 506 (1974). Each of those decisions upheld a litigant's right, under the Federal Arbitration Act, to compel arbitration of a dispute arising from an international transaction, as against a contention that the policies underlying certain other federal statutes guaranteed a judicial forum for the dispute. Id.. The choice-of-law clauses in the parties' agreements were only tangentially mentioned in the Court's opinions, and no issue was raised in either case concerning the effect of these clauses on the applicability of the federal Act. Mitsubishi, supra, 473 U.S. at 637n.19; Scherk, supra, 417 U.S. at 508, 519n.13.

elucidation is the first and most obvious reason why the Court should grant a plenary hearing of this appeal.

IV. The Issue of the Effect of a Choice-of-Law Clause on Federal Preemption of State Arbitration Laws Is Inherently Important, Both Because It Is Likely to Arise with Great Frequency and Because Its Proper Resolution Will Determine the Ultimate Enforceability of Arbitration Agreements in a Large Proportion of the Cases Brought Under the Federal Arbitration Act.

Besides the conflict that currently exists among the decisions on this issue, the other principal reason that justifies review of this case by this Court is the inherent importance of the issue presented here. This issue is important for two reasons.

First, the issue has been presented with great frequency in cases arising under the Federal Arbitration Act. As indicated in the preceding section, the question whether the application of the Act may be excluded by a choice-of-law clause in the parties' agreement has already reached the appellate level in at least sixteen cases during the relatively few years since the comprehensive preemptive effect of the Act was initially discerned by the

courts.* There is no reason why this question will not continue to arise with the same frequency in the future. Given the likelihood of this eventuality, the prospect of a continuation of the wide disparity of views on this issue that presently exists among the lower courts becomes all the more intolerable and needful of correction by this Court.

The second reason this issue is important is that the application of a choice-of-law clause will actually determine the enforceability of arbitration agreements in a substantial proportion of the cases in which enforcement of such agreements is sought under the federal Act. This conclusion can be

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* Indeed, no less than eight of the cases cited above have involved precisely the same choice-of-law clause from the same standard-form contract that is at issue in this case. Del E. Webb Const. Co. v. Richardson Hosp. Auth., supra; Huber, Hunt & Nichols, Inc. v. Architectural Stone Co., supra; Paul Allison, Inc. v. Minikin Storage Co., supra; ADC Const. Co. v. McDaniel Grading, Inc., supra; Standard Co. of New Orleans v. Elliott Const. Co., supra; Eric A. Carlstrom Const. Co. v. Independent School Dist. No. 77, supra; Lane-Tahoe, Inc. v. Kindred Const. Co., supra; Episcopal Housing Corp. v. Federal Ins. Co., supra.

demonstrated merely by examining the single example afforded by the particular kind of obstacle that was posed by state law to the enforcement of the parties' agreement in this case - namely, a state rule permitting a party to evade his contractual duty to arbitrate by commencing litigation involving non-arbitrable ancillary claims against third persons.

Thus, if the cases cited earlier can be taken as a fair sample, it may be plausibly surmised that two of the categories of commercial transactions in which contracts containing both arbitration agreements and choice-of-law clauses are most commonly utilized are construction contracts and brokerage and sales contracts in the securities industry (see cases cited at pages 20-24 and 28-33, supra). Both of these kinds of transactions are inherently likely to involve other participants besides the immediate parties to the agreement, such as the architect, construction manager, and subcontractors on a construction project, and the buyer, the seller, and each party's broker in a securities

transaction. As illustrated by this case and several of the other cases cited above, it is quite easy, given modern liberal rules of joinder, for these other participants to be joined in any litigation that might arise between the parties to the arbitration agreement. Where state law regards the pendency of such multi-party claims as affording a legal excuse from compliance with the duty to arbitrate - as it does in California by virtue of the statute at issue on this appeal and in several other states by virtue of judge-made doctrines - the arbitration agreement is effectively rendered unenforceable under state law against any party who may choose to take advantage of this procedural device to avoid his duty in this regard. Cal.Code Civ.Proc. §1281.2(c). See also J.F. Incorporated v. Vicik, 426 N.E.2d 257 (Ill.App. 1981); County of Jefferson v. Barton-Douglas Contractors, Inc., 282 N.W.2d 155 (Iowa 1979); Prestressed Concrete, Inc. v. Adophson & Peterson, 240 N.W.2d 551 (Minn. 1976). Since federal law does not permit an arbitration agreement to be

avoided in this manner (see cases cited at pp. 22-23, supra), the choice between federal and state law will effectively determine the enforceability of the arbitration agreements in all of these kinds of cases; and this choice in turn will depend upon the interpretation given by the court to the choice-of-law clause that is typically found in these types of contracts. Thus, the ultimate determinant of the enforceability of the parties' agreement to arbitrate in this entire category of cases will be the court's disposition of precisely the issue of interpretation of a choice-of-law clause that is presented in this case.

If it is considered that these cases involving multi-party claims represent only one example of the myriad situations in which state and federal law may differ with respect to the enforceability of arbitration agreements, and in which the court's choice of the applicable law may ultimately depend on its construction of a choice-of-law clause, the conclusion is inescapable that the choice-of-law issue that is presented in this case will have a deter-

minative effect on the outcome of a very sizable percentage of the cases in which arbitration agreements are brought before the courts for enforcement pursuant to the Federal Arbitration Act. This is the second, and perhaps the most significant, reason why this issue is sufficiently important to warrant plenary review by this Court.

IN THE EVENT THE COURT SHOULD DECLINE TO UNDERTAKE PLENARY REVIEW OF THIS CASE, THE DECISION OF THE COURT BELOW SHOULD BE SUMMARILY REVERSED

I. Introduction

In the event these considerations should prove insufficient to persuade the Court to grant a plenary hearing in this case, two alternatives would then be open to it - dismissal of the appeal "for want of a substantial federal question" and summary reversal of the decision of the court of appeal. In this section, Volt will endeavor to show (1) that the first of these alternatives is infeasible because it would effectively overrule, not only most of the decisions of the lower courts on the issue presented here, but also a decision of this Court itself, and (2)

that the second alternative, by contrast, would be entirely appropriate in the circumstances of this case because no plausible argument can be advanced to sustain the judgment of the court below.

II. Even if the Court Should Be Disinclined to Grant a Plenary Hearing in This Case, Dismissal of the Appeal Would Not Be Warranted Because It Would Effectively Overrule, Not Only Most of the Decisions of the Lower Courts on the Issue Presented Here, but Also a Prior Ruling of This Court.

It is well settled that a dismissal of an appeal to this Court "for want of a substantial federal question" is an adjudication on the merits that establishes a binding precedent for the adjudication of all future cases raising the same issue. Hicks v. Miranda, 422 U.S. 332, 343-45 (1975). Accord Mandel v. Bradley, 432 U.S. 173, 176 (1977) (same rule for summary affirmances); Tully v. Griffin, 429 U.S. 68, 74-75 (1976) (semble). Although the precedential effect of such a summary disposition is limited to "the specific challenges presented in the statement of jurisdiction" and to "the precise issues presented and necessarily decided" by the Court's action, it remains true

that, within those limits, an appeal properly brought before this Court cannot be summarily dismissed without establishing "a controlling precedent" on the issues clearly presented by the appeal. Mandel v. Bradley, supra at 176; Tully v. Griffin, supra at 74. See also Illinois State Board of Elections v. Socialist Workers Party, 440 U.S. 173, 180-83 (1979).

Both this jurisdictional statement and the holding of the court below in this case have raised a single narrow issue for decision by this Court - whether a state statute limiting the arbitrability of private disputes, which would otherwise be preempted by the Federal Arbitration Act, may nevertheless be applied to deny enforcement of an arbitration agreement on the basis of a choice-of-law clause in the parties' agreement. The clarity and distinctness with which this issue is presented by this appeal are plainly sufficient, under the rule enunciated above, to compel the conclusion that a dismissal of the appeal would necessarily amount to a ruling by this Court on the merits of that issue. Compare Tully v. Griffin,

supra; Hicks v. Miranda, supra. In effect, the holding of the court below that a choice-of-law clause of the kind involved here effectively precludes the application of an otherwise binding federal statute, and hence validates a rule of state law that clearly contravenes that statute, would thus become the law of the land.

Volt submits that this would be an unfortunate and intolerable result. Not only would it overrule the nearly unanimous decisions of the more than a dozen lower courts that have reached a contrary conclusion on this precise issue; but it would also effectively overrule this Court's own contrary ruling concerning the effect of a nearly identical choice-of-law clause in its earlier opinion in Fidelity Fed. S. & L. Ass'n. v. de la Cuesta, supra. Contemplation of these untoward consequences should be sufficient to persuade the Court that dismissal of this appeal "for want of a substantial federal question" would have disadvantages more serious than those that attend similar dispositions of most of the appeals that are brought before the Court.

III. Summary Reversal of the Court Below, on the Other Hand, Would Be Eminently Appropriate in This Case, Because the Decision of That Court Cannot Be Defended on Any Legitimate Ground.

Unlike a summary dismissal, a summary disposition of this case by reversal of the court below would not be at all inappropriate in the circumstances presented here. Although summary reversals without full briefing are admittedly unusual, this Court has not hesitated to take such action where it has appeared that the decision of the lower court was so clearly erroneous that further briefing would not be a worthwhile expenditure of the Court's time. E.g., United States v. Maryland Savings-Share Ins. Corp., 400 U.S. 4 (1970); Chamberlin v. Dade County Bd. of Public Inst., 377 U.S. 402 (1964). Cf. Harris v. Rivera, 454 U.S. 339 (1981) (summary reversal on certiorari papers); Jago v. VanCuren, 454 U.S. 14 (1981) (semble).

This case meets that description. The earlier discussion has already established that the decision of the court below represents a distinct departure from precedent, inasmuch as

it contravenes both the nearly unanimous decisions of the other lower courts and an earlier ruling of this Court on the precise issue presented here. In the discussion that follows, Volt will additionally demonstrate that, even apart from this consideration and even if this issue were to be viewed as one of first impression, the decision below would be indefensible in any event because it violates every relevant legal principle that ought to bear on the resolution of the issue, ranging from basic rules for interpreting the language of a contract to fundamental constitutional precepts defining the proper relationship between federal and state law under our federal form of government.

A. The Language of the Parties' Agreement

The decision of the court below reflects, first of all, a misreading of the plain language of the parties' agreement. The court somehow managed to read into the phrase "law of the place where the project is located" an exclusive reference to California state law, which would effectively exclude, not only the

law of other states, but also the federal statutory law that would otherwise have been applicable at the site of this project (App. A, pp. 4-6). In fact, however, the court's interpretation of this contractual language is plainly unsound, whether the language is viewed in isolation or as a part of the contract as a whole.

Thus, on its face, the term "law of the place where the project is located" would seem to encompass all of the several bodies of law - state, local, and federal - that are in fact applicable at the site where this contract was performed. There is absolutely nothing in this phrase to suggest an intent to exclude any of these equally applicable bodies of law or to select only one of them, to the exclusion of the others, as the sole source of the law governing the parties' transaction.

Nor does such a selective reading of this contractual term make sense in the context of the entire contract between the parties. To take but one example, certain sections of the contract require the contractor to "pay all

sales, consumer, use and other similar taxes" applicable to his work, and to "comply with all applicable laws, ordinances, rules, regulations and lawful orders of any public authority bearing on the safety of persons or property" at the project site (JA 46, 53). The interpretation of the choice-of-law provision adopted by the court below would have the bizarre and obviously unintended result of confining the coverage of these sections to taxes and safety regulations enacted at the state level and of excluding all of the numerous similar provisions that have been adopted by both the federal government and the local governmental bodies having jurisdiction over the project. Thus, the court's peculiarly narrow reading of the choice-of-law clause contravenes, not only the literal words of the clause itself, but also the basic rule that any contractual provision must be viewed against the background of the complete contract and interpreted in a fashion that is consistent with the entirety of its provisions. See, generally, 3 Corbin, Contracts §549 (1960).

B. The Intent of the Parties

The court of appeal's otherwise unsupportable interpretation of the contractual language cannot be justified - and, if anything, is further belied - by an examination of the probable intent of the parties with respect to the law that would govern their agreement. Although the court intimates at several points in its opinion that there is some evidence, other than the terms of the agreement itself, that the parties consciously "chose to be governed by California law" to the exclusion of the Federal Arbitration Act (App. A, pp. 5, 11, 15), there is in fact no evidence that would support any such notion, and indeed what little evidence exists on the question suggests a clearly contrary conclusion.

The court itself acknowledges that neither party presented any direct evidence of the intent underlying the adoption of either the choice-of-law clause or the arbitration clause (App. A, p. 5). Indeed, since the personnel who executed the contract were construction executives and not lawyers (JA 22), it may

fairly be presumed that they had never heard of either Calif.Code Civ.Proc. §1281.2(c) or the contrary provisions of the Federal Arbitration Act, and consequently had no clear idea of the potential significance of the choice-of-law clause with respect to the enforceability of their agreement to arbitrate their dispute.

The circumstances do suggest, however, that Stanford at least was quite aware of the literal terms and requirements of the arbitration clause itself, since, as indicated above, this clause was prepared by Stanford as a substitute for the standard-form clause ordinarily used with this form of agreement (JA 61). As was also noted earlier, the adoption of this provision reflected a clear awareness on Stanford's part of the possibility of simultaneous disputes with the several participants in the project and the consequent problem of duplicative litigation (id.). Stanford could easily have dealt with this problem by inserting a proviso excusing it from its duty to arbitrate in the event of such disputes with non-parties to the agreement. See Garden Grove

Comm. Church v. Pittsburgh Des Moines Steel Co., supra. It deliberately chose not to do this, however, and instead adopted a provision that expressly preserved its duty to arbitrate notwithstanding the pendency of such third-party disputes, subject only to the possibility that Volt might be required to consolidate the arbitration of its claim with any pending arbitrations with third parties arising out of the transaction (id.). Thus, to the extent the evidence indicates anything about the parties' intent, it shows that Stanford fully intended to proceed with arbitration of its dispute with Volt despite the problem posed by the existence of potential claims against other parties. Since this is precisely the result that would be mandated by federal law and frustrated by the application of state law to the present dispute, this evidence, if anything, ultimately supports the conclusion that federal law should govern this controversy. At all events, it clearly refutes the court of appeal's suggestion that its aberrant reading of the choice-of-law clause might somehow be justified

on the basis of some notion that the parties consciously "chose to be governed by California law" on this issue.

C. The Dictates of Federalism

Finally, as has been suggested at several points in the earlier discussion, the court of appeal's exclusion of federal law from the coverage of the phrase "law of the place where the project is located" violates the fundamental constitutional principle that federal law is "the supreme law of the land," applicable in every state and at every place throughout the union to the same extent as state law. As noted above, this principle was invoked by the dissenting judge in the court of appeal to justify his disapproval of the court's ruling, and also by this Court in the de la Cuesta case to support its interpretation of a nearly identical choice-of-law clause in a manner precisely contrary to the decision of the court below. App. A, pp. 19-23; Fidelity Fed. S. & L. Assn. v. de la Cuesta, supra, 458 U.S. at 157n.12. The principle has found expression in many opinions of this Court, and

has occupied a central role in the jurisprudence of federal-state relations throughout the history of constitutional adjudication. E.g., Testa v. Katt, 330 U.S. 386, 392-93 (1947); Mondou v. New York, N.H. & Hartford R.R. Co. (Second Employers Liability Act Cases), 223 U.S. 1, 57-58 (1912); Hauenstein v. Lynham, 100 U.S. 483, 490 (1880); Claflin v. Houseman, 93 U.S. 130, 136-37 (1876). One of the most perspicuous statements of this settled rule was provided more than a century ago by the opinion of Justice Bradley for a unanimous Court in Claflin v. Houseman, supra, where he said (93 U.S. at 136-37):

> "The laws of the United States are laws of the several States, and just as much binding on the citizens and courts thereof as the state laws are. The United States is not a foreign sovereignty as regards the several States, but is a concurrent and, within its jurisdiction, paramount sovereignty. Every citizen of a State is a subject of two distinct sovereignties, having concurrent jurisdiction in the State; concurrent as to place and persons, though distinct as to subject-matter."

The decision of the court below in this case plainly violates this basic dogma of American federalism. In the face of this Court's repeated affirmations of this important

principle, there can be no conceivable justification for the court of appeal's holding that a choice-of-law provision adopting "the law of the place where the project is located" should be construed as excluding the application of federal law to a project located within the boundaries of one of the states of the United States. This is the final and most conclusive reason why the decision of the court below is ultimately indefensible and should therefore be summarily reversed in the event this Court should decline to undertake plenary review of this case.

CONCLUSION

The issue presented by this case is an important and frequently arising issue which deserves plenary consideration by this Court. The Court should therefore note probable jurisdiction of this appeal and set the case for briefing and argument on the merits. Since the decision of the court below plainly lacks any legal justification, it would also be appropriate for this Court, as an alternative

to plenary review, to enter an order summarily reversing that decision.

Dated: February 1, 1988

Respectfully submitted,

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